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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 962

THOMAS A. McMANIGAL,

Petitioner,

vs.

SEYMOUR SIMON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINIONS AND ORDERS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not reported. It appears as Appendix A to the Petition for Writ of Certiorari. The order of the Court of Appeals entered on September 27, 1967, denying rehearing, appears as Appendix B to the Petition.

The order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on December 12, 1966, denying petitioner's motions to vacate the order of September 7, 1966 (which dismissed the amended complaint) and to reconsider the order of October 13, 1966 (which declined to vacate the dismissal order), appears at Page 52 of Appellant's Appendix filed in the Court of Appeals. The order of the District Court

entered on January 11, 1967, denying petitioner's motion to designate a three-judge Federal Court to hear the amended complaint, appears at Page 54 of Appellant's Appendix filed in the Court of Appeals.

JURISDICTION.

The District Court lacked jurisdiction to hear this case and lacked authority to convene a three-judge court to hear it.

Title 28 U. S. C. Section 2281 is inapplicable to this case and therefore afforded no authority for the District Court to convene a three-judge court.

This case does not raise any constitutional question nor any other Federal question and it does not raise any claim cognizable under the Civil Rights Act. Accordingly, neither Title 28 U. S. C. Section 1331 nor Title 28 U. S. C. Section 1343 affords a basis for Federal jurisdiction over the matter.

The District Court also lacked jurisdiction because neither the Civil Rights Act nor the Declaratory Judgment Act conferred on petitioner any claims or causes of action upon which relief could be granted to him.

QUESTIONS PRESENTED.

I.

Did the District Court err in refusing to convene a three-judge Federal court where the complaint did not challenge the constitutionality of a State statute and did not seek to restrain the enforcement of a State statute, and the defendants were local officers acting in a matter of local concern?

II.

Did the District Court err in dismissing the complaint and in thereafter refusing to vacate the order of dismissal where the allegations failed to demonstrate any grounds for Federal jurisdiction and failed to state any claims on which relief could be granted to plaintiff?

STATUTES INVOLVED.

Title 28 U. S. C. Section 1331:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28 U. S. C. Section 1343:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 28 U. S. C. Section 2201:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28 U. S. C. Section 2202:

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Title 28 U. S. C. Section 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Title 42 U. S. C. Section 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 U. S. C. Section 1985:

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Title 42 U. S. C. Section 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against

law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

STATEMENT.

This is a petition for a writ of certiorari to issue to review two orders of the United States Court of Appeals for the Seventh Circuit whereby that court affirmed two orders of the United States District Court for the Northern District of Illinois, Eastern Division, and denied petitioner's request for rehearing thereon. The District Court's orders denied petitioner's motion for vacation of a prior order dismissing his amended complaint and petitioner's motion that the District Court request the Chief Judge to specify two other judges to serve as members of a three-judge court to hear and determine petitioner's amended complaint for declaratory and injunctive relief against respondents. The amended complaint sought to have declared invalid a resolution of the Board of Commissioners of Cook County authorizing the Board's President to enter into a proposed contract with The Chicago Law Institute and also sought to restrain respondents from commencing any State court action to cancel an agreement of March 11, 1958, between the County of Cook and The Chicago Law Institute providing for housing the Institute's law library in the County Building for a ten-year period expiring April 4, 1968, in exchange for free access to the law library by the Judges of the Circuit Court of Cook County and by certain other designated county and municipal officials.

Petitioner filed his original complaint on July 1, 1966,

in the United States District Court for the Northern District of Illinois, Eastern Division. On motion of respondents, the District Court dismissed the complaint on August 31, 1966, for lack of jurisdiction and for failure to state a claim on which relief could be granted. On September 7, 1966, the District Court vacated the dismissal order of August 31, 1966, granted leave to petitioner to file his amended complaint for declaratory and injunctive relief, and thereupon dismissed the amended complaint *sua sponte*. On October 13, 1966, the District Court denied petitioner's motion to vacate its order of September 7, 1966, dismissing the amended complaint. On December 12, 1966, the District Court denied yet another motion of petitioner, this one requesting the court to reconsider its denial on October 13, 1966, of his previous motion and again requesting vacation of its dismissal of the amended complaint on September 7, 1966. Thereafter, on January 11, 1967, the District Court denied petitioner's final motion, requesting that the court notify the Chief Judge of the Court of Appeals to designate two other judges to serve as members of a three-judge court to hear and determine petitioner's amended complaint for declaratory and injunctive relief against respondents.

On July 21, 1967, the Court of Appeals rendered its judgment affirming the District Court's orders of December 12, 1966, and January 11, 1967. Thereafter on September 27, 1967, the Court of Appeals denied petitioner's request for rehearing on its judgment of July 21, 1967, affirming entry of the District Court's orders. It is the two orders of July 21, 1967, and September 27, 1967, for the review of which petitioner now prays that a writ of certiorari issue.

ARGUMENT.

I.

REFUSAL TO CONVENE A THREE-JUDGE COURT WAS PROPER.

Both in his amended complaint and in his motion of January 11, 1967, petitioner requested that the District Court notify the Chief Judge of the Court of Appeals to designate two other judges to serve as members of a three-judge court to hear and determine the case. The request to convene a three-judge court was based on Title 28 U. S. C. Section 2281.

It is well-settled that § 2281 is to be narrowly construed so that only those cases which plainly fall within the class described by it are referred to a three-judge court. See, *e.g., Marshall* v. *Sawyer,* 301 F. 2d 639 (9th Cir. 1962). Moreover, the individual District Court Judge to whom the request that a three-judge court be convened is made, clearly may properly consider the question of his own jurisdiction. *Stamler* v. *Willis,* 371 F. 2d 413, 414 (n. 3) (7th Cir. 1966); *Lion Manufacturing Corporation* v. *Kennedy,* 330 F. 2d 833 (D. C. Cir. 1964). Examination of the amended complaint shows that § 2281 is clearly inapplicable to support the request for a three-judge court to hear this case, for the following reasons:

1. There is no meritorious allegation that any statute of the State of Illinois is unconstitutional. Section 2281 does not require a three-judge court where the constitutionality of a State statute is not questioned. *Sherwood* v. *Bradford,* 246 F. Supp. 550, 551 (S. D. Calif. C. D. 1965). Furthermore, even if the

amended complaint had alleged that a statute of the State of Illinois was unconstitutional, § 2281 would not have required the District Court to request that a three-judge court be convened unless a substantial Constitutional question were presented. *Powell* v. *Workmen's Compensation Board of State of New York,* 327 F. 2d 131 (2nd Cir. 1964).

2. The amended complaint seeks to enjoin the members of the Board of Commissioners of Cook County and the State's Attorney of Cook County. These officials are local officers, not State officers, whereas § 2281 is applicable only to State officials. Where defendants are local officers, and the case concerns a matter of local interest only, § 2281 does not require a three-judge court. *Pierre* v. *Jordan,* 333 F. 2d 951, 957 (9th Cir. 1964).

3. Petitioner does not seek to restrain "the enforcement, operation or execution of any State statute." This deficiency makes § 2281 inapplicable as authority for convening a three-judge court to hear and determine the amended complaint. *Ex Parte Collins,* 277 U. S. 565 (1928).

Respondents respectfully submit that § 2281 cannot properly be invoked to support a three-judge court in this case. Accordingly, the District Court was correct in refusing to request that a three-judge court be convened, and the Court of Appeals was correct in affirming the District Court's order of January 11, 1967, to that effect.

II.

DISMISSAL FOR WANT OF FEDERAL JURISDICTION WAS PROPER.

Petitioner relies on Title 28 U. S. C. Section 1331 and Title 28 U. S. C. Section 1343 to establish Federal jurisdiction in this case, but neither section supports petitioner's reliance, and the District Court was clearly correct in dismissing the amended complaint for want of Federal jurisdiction.

A. There Is No Federal Question Under § 1331.

The amended complaint alleges that a certain resolution of the Board of Commissioners of Cook County constitutes an impairment of a contract between The Chicago Law Institute and the County of Cook. Such a conclusory allegation clearly is insufficient to establish Federal jurisdiction. Furthermore, a resolution does not amount to an ordinance or a law impairing the obligation of a contract. *Des Moines* v. *City Ry.*, 214 U. S. 179 (1909). Therefore it is clear that petitioner's mere allegation of impairment of contract, unsupported by facts, cannot afford the necessary basis for establishing Federal jurisdiction to hear a suit to enjoin enforcement of the resolution of the Board of Commissioners of Cook County.

The amended complaint also alleges that petitioner has been deprived of property without due process of law, but, again, nowhere does the amended complaint allege any facts to support such a legal conclusion. Indeed, the factual allegations of the amended compaint rebut petitioner's conclusory allegation that he has been deprived of property without due process of law. It is clearly not sufficient, for purposes of establishing Federal jurisdiction to hear and determine a lawsuit, merely to make conclusory

allegations without the support of facts. *Kregger* v. *Posner,* 248 F. Supp. 804 (E. D. Mich. S. D. 1966).

Respondents respectfully submit that petitioner's conclusory allegations of impairment of contract and deprivation of property without due process are insufficient to establish Federal jurisdiction under § 1331, and that both the District Court and the Court of Appeals properly determined there was no Federal jurisdiction to hear this case.

B. There Is No Federal Jurisdiction Under § 1343.

The amended complaint purports to state a claim under the Civil Rights Act, 42 U. S. C. §§ 1983, 1985, 1988, and petitioner thereby attempts to invoke Federal jurisdiction pursuant to Title 28 U. S. C. Section 1343. The gist of petitioner's complaint appears to be that he had a property interest in the assets of The Chicago Law Institute, of which he has been deprived by respondents acting under color of State law. There has been no such deprivation, but, in any event, such conclusory allegations, devoid of any factual allegations which support the legal conclusion, clearly are not sufficient to establish Federal jurisdiction. *Ream* v. *Handley,* 359 F. 2d 728 (7th Cir. 1966); *Abernathy* v. *Carpenter,* 208 F. Supp. 793 (W. D. Mo. C. D. 1962).

Furthermore, Sections 1983, 1985 and 1988 of the Civil Rights Act are not applicable to this case and therefore cannot afford any basis for Federal jurisdiction. Section 1983 provides a remedy when a person had been deprived of "any rights, privileges or immunities secured by the Constitution and laws" by an individual acting under color of State law. In his amended complaint, petitioner fails to demonstrate any such deprivation. Furthermore, the members of a non-profit organization do not have any interest in the assets of the organization which can be

classified as a "right, privilege or immunity" secured by the Constitution, but even if petitioner, as a member, did have such a property interest in the assets of The Chicago Law Institute, that interest is not the kind of interest which falls within the protection of the Civil Rights Act. *Ream* v. *Handley,* 359 F. 2d 728, 731 (7th Cir. 1966); see *Anderson* v. *Tenshaw Land & Timber Co.,* 326 F. 2d 855 (5th Cir. 1964).

Section 1985 requires five elements to state a cause of action for relief under it, as follows: (1) a conspiracy by the defendants; (2) with the purpose of depriving the plaintiff of equal protection of law or equal privileges and immunities under law; (3) a purposeful intent to discriminate; (4) action by the defendants under color of State law or authority; and (5) injury to the plaintiff's person or property or his deprivation of a right or privilege of a United States citizen resulting from acts in furtherance of the conspiracy. *Colon* v. *Grieco,* 226 F. Supp. 414 (D. New Jersey 1964). The amended complaint lacks these elements, and jurisdiction accordingly cannot be based on a cause of action under § 1985. Except for one allegation that respondents acted "in concert," the amended complaint nowhere shows any conspiracy among respondents. Petitioner's characterization of the conduct of certain officials, who are not parties in this action, is without any basis in fact, but even if there were merit to these allegations, his characterization of the conduct of certain State officers as "conspiratorial" and "unlawful" is insufficient to state a claim for relief against respondents. *Dinwiddie* v. *Brown,* 230 F. 2d 465 (5th Cir. 1956), *cert. den.,* 351 U. S. 971 (1956), *reh. den.,* 352 U. S. 861 (1956). Furthermore, nowhere does the amended complaint show a purposeful intent on respondents' part to discriminate against petitioner, and nowhere does it show any compensable injury to petitioner's property or rights.

Section 1988 obviously furnishes no independent cause of action cognizable under § 1343, as do § 1983 and § 1985, and merely governs procedure and remedy in suits brought under the latter two sections. Section 1988 is wholly inapplicable to this case and cannot possibly provide petitioner with a Federal right of action cognizable in the District Court under § 1343.

Respondents respectfully submit that petitioner has failed to demonstrate any injury which is redressable in a Federal right of action under § 1983, § 1985, or § 1988 of the Civil Rights Act. Therefore these sections are not applicable to establish Federal jurisdiction under § 1343. Accordingly, both the District Court and the Court of Appeals properly determined there was no Federal jurisdiction to hear this case.

III.

DISMISSAL FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED WAS PROPER.

Petitioner relies on Title 28 U. S. C. Sections 2201 and 2202 and on Title 42 U. S. C. Sections 1983, 1985 and 1988 to establish his claim or claims for relief, but none of these sections support the alleged causes of action.

A. No Relief Is Warranted Under §§ 2201-2202.

Sections 2201 and 2202 of the Declaratory Judgment Act, 28 U. S. C. §§ 2201-2202, do not help petitioner in stating a claim on which relief can be granted. These sections do not create an independent ground of Federal jurisdiction, but merely afford a procedure for securing relief where there is already an actual controversy within the jurisdiction of a Federal court. *Ream* v. *Handley,* 359 F. 2d 728, 732 (7th Cir. 1966). Petitioner having failed in otherwise establishing a Federal question in this case,

cannot now invoke § 2201 and § 2202 as an independent ground for relief in the District Court.

B. No Relief Is Warranted Under §§ 1983, 1985, 1988.

Sections 1983, 1985 and 1988 of the Civil Rights Act, 42 U. S. C. §§ 1983, 1985, 1988, do not help petitioner in stating a claim on which relief can be granted. These sections are not applicable to this case, for the reasons stated at Point II (B), *supra,* but even if they were applicable, they would not warrant any relief because bare conclusory allegations, without support in facts alleged, are insufficient to make out a claim for relief under the Civil Rights Act. *Pugliano* v. *Staziak,* 231 F. Supp. 347 (W. D. Pa. 1964), *aff'd,* 345 F. 2d 797 (3rd Cir. 1965). The complaint in an action purporting to be brought under the Civil Rights Act must allege highly specific facts. Petitioner failed to do so in his amended complaint, and the District Court properly determined that the amended complaint failed to state a claim on which relief could be granted under the Civil Rights Act.

Respondents respectfully submit that petitioner has failed to state any claim upon which relief could be granted by the District Court. Accordingly, both the District Court and the Court of Appeals properly determined that petitioner's amended complaint should be dismissed.

CONCLUSION.

Respondents respectfully submit that the District Court properly refused to convene a three-judge court, since petitioner's amended complaint did not challenge the constitutionality of a State statute and did not seek to restrain the enforcement of a State statute, and respondents were local officers acting in a matter of local concern. Respondents further respectfully submit that the District Court

properly dismissed the case and thereafter properly refused to vacate its order of dismissal, since the amended complaint failed to demonstrate any grounds on which to maintain Federal jurisdiction and also failed to state any claims on which relief could be granted to petitioner.

The decisions of the District Court and the Court of Appeals are clearly correct. No conflict of decisions is presented. No constitutional questions or any other Federal questions are presented. Therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

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